No. 12,430

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,

vs.

JACK B. TENNEY; THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee); HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON; CLYDE A. WATSON and ELMER E. ROBINSON,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

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APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

APPELLANT'S COMPLAINT ENTITLES HIM TO TRIAL.

Appellees, although they moved to dismiss appellant's complaint on the ground that it does not state a claim for relief, now seek to argue the untried facts of the case in briefs to this Court.

Appellant will not follow appellees' invasion of the province of the trier of facts.

It is appellant's contention that he has properly pleaded in his complaint that appellees did, or participated in, the acts complained of, with malice and intent to intimidate and silence appellant, and deter and prevent him from effectively exercising fundamental Federal rights, and that their actions had such intended effect on appellant. These allegations of appellant's complaint must be read in the context of the factual circumstances which are therein fully set forth.

As stated in *William v. Miller,* 48 Fed. Supp. 277, on which appellees rely:

> "It is expedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer". (Words which were used by Justice Stone and Justice Cardozo concurring in *Borden's Farm Products Co. v. Baldwin,* 293 U.S. 194, 213.)

As also stated in *Williams v. Miller* (supra), at page 280 thereof, the United States Supreme Court, where unconstitutionality of State legislation was the contention:

> "* * * held it to be error to dismiss a complaint for failure to state a cause of action when it alleged facts such that their proof might reasonably lead the Court to hold the legislation unconstitutional. Polk Co. v. Glover, 305 U.S. 5, 59

S.Ct. 15, 83 L.Ed. 6 supra; Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281. In both cases the Court expressly refrained from deciding that the plaintiff would be entitled to relief upon proof of the facts alleged; the determination of that question was postponed until evidence of the actual facts was before the court so that the court 'in enforcing individual rights, shall not proceed upon false assumptions' ".

It can hardly be contended in the instant case, the complaint, accepting its allegations as true, fails to state facts "utterly unsuggestive of the invasion of any constitutional right". See *Williams v. Miller,* (supra) at page 280.

II.

APPELLEE COMMITTEE AND ITS MEMBERS ACTING UNDER COLOR OF STATE LAW DEPRIVED APPELLANT OF FUNDAMENTAL FEDERAL RIGHTS.

The gravamen of appellant's action is that appellees, acting under color of State law, deprived him of fundamental federal rights. The question before this Court necessitates not only taking appellant's pleading as true, but also examining the same as a whole and taking each of the facts alleged in context. If so read, each and every action of appellees complained of was taken as part and parcel of a preconceived plan, by means of State power vested in the appellee committee, to accomplish these infringements and violations of appellant's federal rights.

In answer to appellant's contention, appellees use the method of isolating their actions; arguing that some were not deprivative of appellant's federal rights and others were not accomplished "under color of State law".

(A) All actions of appellee Committee and its members complained of were done under color of State law.

So it is argued by appellees that the signing and filing of the criminal complaint by the chairman of appellee committee pursuant to unanimous resolution of said committee was not action "under color of State law". (Appellees' Brief, pp. 24-27.) It may well be that the act of signing and filing a criminal complaint as such is not action taken under color of State law. If, however, the action of appellees immediately preceeding the signing and filing of such complaint are given due consideration, it appears on the facts pleaded: that appellant was subpoenaed under State authority; that he was subjected to an unfair hearing under State authority; and the resolution to cause the criminal prosecution of appellant was passed by the State Legislative Committee in question—it follows that the signing and filing of the criminal complaint cannot be divorced from appellees' common plan to intimidate appellant and effectively deter him from pursuing his lawful criticism of the committee in question in his attempt to persuade the legislature to discontinue appropriations of funds for said committee.

Appellees also argue that the sending of the State telegrams signed by the appellees Tenney and Burns as chairman and vice chairman of appellee committee, and paid for by State funds, was not action under color of State law. This argument not only ignores the common plan pleaded in the complaint as a whole, but is contrary to the express language in each of said State telegrams which were set forth *in haec verba* and made a part of appellant's complaint, to wit:

> "*On Behalf of the Senate Committee,* We Urge You to Charge Brandhove with Perjury * * *". (Italics supplied.) (T.R. p. 25, 24.)

Appellees seem also to rely on the assertion that the California State Legislature recessed before the hearing complained of took place.

This assertion is immaterial on the ground that the appellee committee and its members would have been acting "under color of State law" even if the committee had no authority to hold a hearing during a recess of the Legislature.

See:

Screws v. United States, 325 U.S. 91, 110, 114, 115;

United States v. Classic, 313 U.S. 299, 326;

Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 287.

Moreover the Senate Resolution creating the appellee committee (T.R. pp. 12-18), pursuant to Article

IV, section 37 of the California Constitution authorized said committee to act during any such recess of the State Legislature. (T.R. pp. 14-15.)

(B) The appellee Committee and its members deprived appellant of fundamental federal rights.

In determining from the complaint in question that the federal rights of appellant were invaded by appellee committee and its members, the issue in the present case must be clearly distinguished from the issues determined in the cases concerning the Congressional Committee on Un-American Activities which are cited in appellees' briefs.

There is no question in the instant case as to appellee committee's power to summon and examine witnesses in aid of the legislative function.

Appellant's contention is that appellee committee and its members engaged in patent abuse of such power and used that power as a cloak to deprive appellant of his federal rights.

The issue before this Court is whether the committee in question can lawfully make use of its powers for the purpose of suppressing criticism and perpetuating itself by deterring a citizen from opposing an appropriation of funds for said committee in the manner here alleged.

No question is raised as to the right of appellee committee and its members to use their influence and power of persuasion to secure the continued existence of such committee. It is appellant's position, how-

ever, that for such end, they must fight in the political arena on the level of equality with others, not by abusing their public power.

(1) Infringement of Freedom of Speech.

Appellees contend that appellant's right of free speech was not infringed. This contention ignores the fact that the right of free speech is guaranteed by the Constitution not merely for the benefit of the individual who exercises that right but in order to insure the continuing existence of a democratic community.

As recently stated in *Terminiello v. City of Chicago,* 93 L.Ed. Adv. Op. 865, 867-868:

> "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger * * * That is why freedom of speech, though not absolute * * * is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."

It appears to be appellees' position that since they did not expressly prohibit further dissemination by

appellant of his petition and his ideas therein expressed, no infringement of the right of free speech was perfected.

The constitutional right of free speech is protected against more subtle attacks than such express prohibitions. Where, as here, State authority is used as a pervasive threat by creating a situation and atmosphere of fear and danger for him who speaks, a violation of this fundamental right is effected.

In the words of the United States Supreme Court:

> "This Court has characterized the freedom of speech and that of the press as fundamental rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free governments by free men * * *. In every case, therefore, where legislative abridgement is asserted, the Courts should be astute to examine the effect of the challenged legislation * * *. And so, as cases arise, the delicate and difficult task falls upon the Courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." *(Schneider v. Irvington,* 308 U.S. 147, 161-162.)

> "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." (*Thornhill v. Alabama,* 310 U.S. 88, 101-102.)

See also: *Pennekamp v. Florida,* 328 U.S. 331.

(2) Violation of Due Process of Law.

It cannot be seriously questioned that the issue of violation of due process of law has been properly raised by appellant's complaint. To conclude otherwise would mean to say that a State legislative committee, becoming aware of a citizen's criticism and protest against a further appropriation of funds for that committee, for the purpose of suppressing that criticism, can act as judge and *accused* in the same cause; that such committee can lawfully and while the citizen is actually engaged in such criticism, subpoena him to appear at a hearing without disclosing in such subpoena the purpose thereof, and at such hearing, in addition to interrogating the citizen with questions, sworn answers to which that committee had previously obtained from that citizen, can vilify and discredit that citizen by reading into the record of such hearing a false alleged criminal record of that citizen; a newspaper article wherein an affidavit of that citizen was called a "tissue of lies"; and an alleged telephonic statement that that citizen "was a liar"; and further at such hearing can deter and intimidate that citizen by interrogating his counsel, present thereat with permission of such committee, and without justification or excuse, threaten expulsion of such counsel from the hearing room.

If such is a fair and impartial hearing as contemplated under the XIV Amendment of the Constitution of the United States, then appellant admits that he has failed to state a claim for relief on such ground.

III.

THE LIABILITY OF APPELLEE ROBINSON.

An action for damages for deprivation of civil rights sounds in tort.

See: 8 *U.S.C.A.*, section 43 note 20, and cases there cited.

The concept of conspiracy in tort law is historically coincident with the analogous concept of the criminal law.

See: Prosser on Torts, Hornbook Series (1941) pp. 1094-5. As stated by said author, citing cases:

> "All those who actively participate in a tortious act by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts, done for their benefit, are equally liable with him. Express agreement is not necessary and all that is required is that there should be a common design or understanding even though it be a tacit one".

No further discussion is necessary to show that appellant's complaint states facts sufficient to constitute a claim for relief against this appellee. It is irrelevant in this case whether the liability of appellee Robinson is predicated solely on section 43 of U.S.C. Title 8 or upon that section and section 47(3) of the Civil Rights Act. In answer to said appellee's contention that no violation of the equal protection clause of the Federal Constitution was effected and therefore no violation of section 47(3) of the Civil Rights Act, the Court will observe from the facts pleaded

that appellant and his counsel were singled out for obvious unfair treatment as witnesses at the hearing in question which warrants appellant's contention that the equal protection clause was violated as to him.

IV.

CONCLUSION.

It is respectfully submitted that appellant is entitled to a trial against each appellee on his complaint.

Dated, San Francisco, California,
April 26, 1950.

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